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NO. 67377-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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REC'D

FEB 03 2012

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

THOMAS GAUTHIER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglass North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. . The trial court erred by admitting evidence that appellant asserted his constitutional rights not to consent to a warrantless search of his DNA and permitting the State to use the assertion of that right as substantive evidence of guilt.

2. Counsel was ineffective in failing to cite the Fourth Amendment and Article I, Section 7 of Washington's constitution when opposing evidence that appellant refusal to consent to a warrantless search of his DNA and in failing to object when the prosecutor argued assertion of this constitutional right was a sign of guilt.

3. The prosecutor committed misconduct in commenting on appellant's assertion of his constitutional rights to refuse consent to a warrantless search of his DNA.

Issues Pertaining to Assignments of Error

1. Appellant had the right, under the Fourth Amendment and Article I, Section 7 of Washington's constitution to refuse consent to a search of his DNA. Did the State impermissibly penalize appellant for exercising these rights by eliciting testimony he did not consent to a warrantless search of his DNA and by arguing the assertion of this right showed consciousness of guilt?

2. Appellant had a constitutional right to effective assistance of counsel. Before trial, his attorney opposed admission of evidence of his refusal to provide a DNA sample, citing only the right to counsel and the privilege against self-incrimination but not the right to decline a consensual search under the Fourth Amendment or Article I, Section 7. Nor did the attorney object when, during closing argument, the prosecutor argued the assertion of this constitutional right was substantive evidence of guilt. Was counsel ineffective in failing to lodge a contemporaneous objection and cite the law that would have supported exclusion of the evidence?

3. Appellant had the right under both the federal and state constitutions, to refuse consent to a search of his DNA. Did the prosecutor commit misconduct during closing argument by using the assertion of this constitutional right as substantive evidence of guilt?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Thomas Gauthier with second-degree rape. CP 1. The jury found him guilty and the court imposed a standard range sentence. CP 40, 46. Notice of appeal was timely filed. CP 53.

2. Substantive Facts

a. Gauthier's Testimony

In January of 2001, Gauthier was not doing well. He had been kicked out of school for the last time in the twelfth grade and did not graduate. 4RP<sup>1</sup> 133. He was doing some carpentry work but was addicted to crack cocaine. 4RP 135-36. He stayed sometimes with his mother, sometimes with a girlfriend in the area near Des Moines Memorial Drive where he had grown up. 4RP 133, 137. He also frequented prostitutes in the area. 4RP 163.

On June 28, 2001, he was stopped by police, who questioned him about a rape. 4RP 140. The officer who spoke with him did not tell him the date the incident had occurred. 3RP 89. Gauthier truthfully told the officer he had been in the King County Jail from May 9 until just a few days before. 3RP 82. The officer took his contact information and let him go on his way. 3RP 87-88.

Several years later in 2008, Gauthier's mother died and left him a little money. 4RP 141. He decided to use the money to make a new start. 4RP 141. He was living in Arizona when his brother called and said police were looking for him. 4RP 139. When he spoke with Officer Knudsen, he

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<sup>1</sup> There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 5, 9, 10, 23, 24, 2011; 2RP – May 25, 2011; 3RP – May 26, 2011; 4RP – May 31, 2011; 5RP – June 1, 2, and July 8, 2011.

learned that his DNA was found on the jacket sleeve of a woman who claimed to have been raped. 4RP 143. Knudsen asked if he could explain why his DNA would be there. 5RP 10. Knudsen gave little or no details about the incident, and Gauthier could not explain. 4RP 143; 5RP 26. He told Officer Knudsen he had frequented prostitutes in the area, and that they would usually engage in oral sex in a car for \$20. 5RP 13-14. He repeatedly denied raping anyone. 5RP 12, 25-26, 43, 49-50, 59.

At trial, Gauthier testified he now recalled the incident on the night of April 21-22, 2001. 4RP 143-44. He was walking on Des Moines Memorial Drive after the bars were closed. 4RP 144. He was high, but, as he explained, not high enough, and hoped to find someone to sell him some crack. 4RP 144-45. When he saw a woman walking ahead of him, he caught up to her and asked if she had some. 4RP 145-46. She said she did not, but could get some. 4RP 146-47. Rather than giving her money, Gauthier asked if she would she be willing to have sex in exchange for money. 4RP 146-47, 162. After he agreed to pay \$50 for oral sex, Gauthier testified, the pair stepped over the guardrail into a grassy area. 4RP 147-48; 5RP 23. There he laid his coat down, and she got on her knees and performed oral sex. 4RP 147-48.

When the woman asked for her money, Gauthier admitted he did not have it. 4RP 148. He was certain at the time that she was the same person

who had previously failed to pay him in a drug deal, so he felt this was payback. 4RP 148-49. She became angry and yelled at him to give her the money. 4RP 149. Gauthier testified he never tackled, struck or forced her in any way. 4RP 150. He did not tell this story to Knudsen because the rape accusation came out of the blue seven years later. 5RP 25-26. Because Knudsen did not offer any details such as the specific location or the date, he did not put it together with this incident until much later. 5RP 26. Knudsen testified he specifically asked Gauthier if he ever had a bad experience with a prostitute and Gauthier said he had not. 5RP 45-46.

b. T.A.'s Testimony

T.A. testified she worked at a casino on Des Moines Memorial Drive and regularly walked back and forth from her apartment since she did not have a car. 4RP 17-18. The casino was only closed between 6 and 8 a.m., so she often walked along Des Moines Memorial Drive at odd hours. 4RP 14-15. She testified that on the night of April 21-22, 2001, she probably worked the 10 p.m. to 6 a.m. shift. 4RP 21. She then changed her mind and testified she could not remember what shift she had worked. 4RP 21. She claimed she walked back to her apartment from the casino sometime between 10:30 p.m. and 2 a.m. 4RP 21-22. Then, she walked back to the casino to meet up with her friend Sigreid, who was to come and spend the

night at her apartment. 4RP 23. On the way to the casino, she noticed a homeless man across the street mumbling to himself. 4RP 27-28.

At the casino, she had some wine and waited for Sigreid. 4RP 29. Eventually, it became clear Sigreid could not get away. 4RP 29. Sigreid decided to stay and work an extra shift, so T.A. headed back to her apartment again. 4RP 30-31.

On the way home, T.A. testified, she was grabbed from behind, pushed down over the guard rail into the grass, and was forced to have oral sex. 4RP 31. She testified she told the man she was on her period, and even pulled out her tampon to prove it. 4RP 36-37. A tampon was later found at the scene. 2RP 40. She testified her assailant applied pressure to the back of her head with one hand, while she was on her knees. 4RP 41-43. She claimed he told her he was crazy and would hurt her. 4RP 39. She resisted a bit, but feared he would kill her and throw her in the nearby ravine. 4RP 43.

After he finished, the man ran away. 4RP 44. T.A. wiped her mouth on her coat and went home. 4RP 44. She testified she screamed and banged on her neighbors' doors, but no one would answer. 4RP 45. This made her feel like a whore. 4RP 45. She did not call the police from her apartment because her phone did not work. 4RP 23-24. Angry, she grabbed her kitchen knife and went out into the night to find the man and kill him. 4RP 46.

She went all the way back to the casino, but did not find him. 4RP 46-47. She did not tell anyone at the casino what had happened. Nor did she use a phone at the casino to call the police. She walked back to her apartment and waited. 4RP 48. Finally, she got a phone call from Donald Brown, her sister's boyfriend. 4RP 48. She told Brown everything that happened. 4RP 48.

Her sister then stayed on the phone with her while Brown drove to her apartment. 4RP 49. T.A.'s sister testified T.A. was very upset and not her normal outgoing self. 3RP 44. She testified T.A. only said she was "jumped." 3RP 46. She would not give any details but said she wanted to kill the man. 3RP 46. T.A. did not tell her sister the full story of what happened until about a month before trial. 4RP 50. She found it difficult to talk about; she only told Brown because he was particularly easy to talk to. 4RP 50.

When Brown arrived, T.A. got in his car, and the two drove around the area looking for the man. 4RP 50. Brown testified T.A. was crying and upset; he had never seen her like that. 2RP 103. But T.A. did not ask Brown or her sister to call the police. 4RP 87. They again went back to the casino; Sigreid was there, but T.A. again told no one what happened. 4RP 50. She claimed she did not call the police because she wanted to find him and take

care of it herself. 4RP 50-51, 87-88. At some point, she changed her mind and decided he was not worth going to prison. 4RP 46.

The next morning, she realized that although her cell phone service was cut off, she could still dial 911. 4RP 52. She finally called the police after she told her ten-year old daughter about the rape and her daughter asked if she had called the police yet. 4RP 52. The 911 call, was played for the jury. 4RP 56.

When the deputy arrived, he testified, T.A. was upset and crying. 2RP 22. She took him to the grassy area on the other side of the guardrail where the alleged rape occurred and gave him her clothes. 4RP 57-58. The deputy saw an area of flattened grass and a tampon that he collected as evidence. 3RP 151. She told the deputy the man who attacked her looked like the homeless man she had seen earlier. 4RP 38, 103-05. Police also took her statement and photographs of bruises and swelling on her left upper arm and right hip. 3RP 149. In court, T.A. identified Gauthier as the man who attacked her. 4RP 39-40.

T.A. testified she had only been working at the casino for three or four months when this occurred. 4RP 15. She lost the job two weeks later because after this incident she was afraid to work Saturdays. 4RP 64-65. Police could not contact Sigreid because T.A. could not give them a phone number or even a last name. 3RP 175; 4RP 16-17. Police never verified

with the casino whether T.A. in fact worked there or to try to find Sigreid. 3RP 199.

c. DNA Evidence

The crime lab found DNA on the sleeve of T.A.'s jacket. 3RP 127-28. The result was a mixed profile: one male partial profile and a female partial profile matching T.A. 3RP 128. At the time, there was no reference sample in the database matching the male profile. 3RP 133.

At least once or twice during the intervening years, police called T.A. to look at photographs to see if she could identify a suspect. 4RP 65-66. On one occasion, she was shown a photograph of Lee Fatland. 3RP 178-80. She was 80% certain he was her assailant, but his DNA was not a match. 3RP 178-80. In the fall of 2008, police reactivated the case upon learning Gauthier's DNA matched the sample from T.A.'s jacket sleeve. 2RP 79-81.

Defense counsel moved to exclude evidence that Gauthier had refused to provide a DNA sample when he was first contacted by authorities in Arizona, arguing it would be a comment on his right to silence under the Fifth Amendment and his right to counsel. 1RP 138; CP 15-16. Counsel also argued the State could (and later did) get a warrant to obtain the DNA sample, but without that warrant, Gauthier had a right to refuse. 1RP 140. The court reasoned the evidence would not violate the Fifth Amendment privilege against self-incrimination because DNA is not testimonial. 1RP

139. Ultimately, the court ruled that, if Gauthier testified, the prosecutor could cross-examine him about his refusal to provide a DNA sample so long as the question did not reference his right to an attorney. 1RP 142, 144.

On cross-examination, the prosecutor questioned Gauthier about his refusal to provide a DNA sample. 4RP 173-75. Gauthier testified Detective Knudsen asked for a DNA sample and Gauthier told him he wanted to talk to an attorney first. 4RP 173. He testified he later called and left a message saying he was refusing to provide the sample on advice of counsel. 4RP 175. He denied initially agreeing to give the sample and then refusing when the time came to actually provide it. 4RP 174-75.

On rebuttal, the State called Detective Knudsen, who contradicted this testimony. 5RP 51-56. Knudsen testified that when he initially spoke with Gauthier on the phone, Gauthier first said he had already given DNA samples in the past, but agreed to provide a new one. 5RP 51-52. When Knudsen called the next day to arrange the sample, he testified, Gauthier was still willing. 5RP 54. However, he later got a call from an Arizona detective informing him Gauthier was refusing to give the sample. 5RP 55. Gauthier told the Arizona detectives he was refusing on advice of counsel. 5RP 57. Ultimately, Gauthier provided a DNA sample after arriving in Seattle. 5RP 55-56.

In closing argument, defense counsel attempted to remove the sting of the testimony by arguing it was only reasonable to refuse to give a DNA sample when one's lawyer so advises. 5RP 101. In rebuttal, the prosecutor contrasted Gauthier's conduct with that of Fatland, another initial suspect in the case. 5RP 113. She argued Gauthier's decision not to voluntarily provide a DNA sample showed he was guilty:

What did Lee Fatland do? Sign me up. Here are my swabs. I didn't do this. And low and behold Lee Fatland was excluded. Excluded. Exonerated by DNA from that jacket. Lee Fatland's actions of sign me up, here's my DNA, I didn't do this are consistent with someone who is innocent. This guy's actions are consistent with someone who is not. You don't want to provide your DNA sample because, you know it's going to be there. Because you're guilty.

5RP 113.

C. ARGUMENT

1. THE STATE IMPROPERLY PENALIZED GAUTHIER FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO REFUSE CONSENT TO A WARRANTLESS SEARCH OF HIS DNA.

The State violated Gauthier's rights under the Fourth Amendment and Article 1, Section 7 of the Washington Constitution by presenting evidence and argument focusing on his refusal to provide a DNA sample. 4RP 173-75; 5RP 113. This Court should reverse for three main reasons. First, using a refusal of consent to search as evidence of guilt violates due process by attaching a penalty to the exercise of a constitutional right.

Second, the evidence and argument was clearly intended as a comment on the exercise of a constitutional right, rather than a mere passing reference. The State made no attempt to use the evidence for any permissible material purpose other than to penalize Gauthier for exercising his constitutional rights. Finally, the State cannot show that the error was harmless beyond a reasonable doubt because the entire case hinged on credibility.

a. Courts in Washington and Around the Country Have Concluded the State May Not Use a Refusal of Consent to Search as Substantive Evidence of Guilt.

Both the Fourth Amendment and Article I, Section 7 of the Washington Constitution safeguard the right to refuse to consent to a warrantless search of person or property. Schneckloth v. Bustamante, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); State v. Morse, 156 Wn. 2d 1, 13, 123 P.3d 832 (2005) (citing State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998)). Collecting a biological sample for DNA testing is a search that may be refused in the absence of a warrant. See Ferguson v. City of Charleston, 532 U.S. 67, 76, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (urine tests by state actors were “indisputably searches within the meaning of the Fourth Amendment”); State v. Surge, 160 Wn.2d 65, 79-81, 156 P.3d 208 (2007) (holding mandatory DNA sampling of convicted felons does not invade private affairs under state constitution and assuming such sampling to be a search under the Fourth Amendment); State v. Curran, 116

Wn.2d 174, 184, 804 P.2d 558 (1991) (holding blood test an article I, section 7 “search and seizure”) overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

Therefore, the State may not punish a defendant for refusing consent to a warrantless search by telling the jury that refusal is evidence of guilt. State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010). In Jones, the prosecutor “highlighted how Jones had only provided a DNA swab sample *after* a court order forced him to do so.” Id. The court reversed on other grounds, but addressed this issue because it was likely to recur on remand. Id. The court concluded the prosecutor’s comments were improper because Jones had a Fourth Amendment right to refuse to provide a DNA sample. Id. More than a year before the trial in this case, the Washington Supreme Court in Jones declared, “We go so far as to say that the court’s imprimatur is now upon the State and that such argument is improper and should not be repeated.” Id.

Many courts have gone further, and held that the mere admission of evidence of the refusal of consent to search violates the Fourth Amendment and requires reversal. In United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978) the Ninth Circuit held it was prejudicial error to admit evidence the defendant refused permission for a warrantless search of her apartment. The court explained a person cannot be penalized for asserting the Fourth

Amendment right to refuse consent: “The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. . . . Nor can it be evidence of a crime.” Id. at 1351. Prescott began its analysis by considering the well-established principle that a person may not be penalized for exercising the Fifth Amendment right to silence. Id. at 1351-52 (citing Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) and Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)). The court reasoned the same principle applies under the Fourth Amendment:

Just as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from criminal liability, so one may withhold consent to a warrantless search, even though one’s purpose be to conceal evidence of wrongdoing.

...

The rule that we announce . . . seeks to protect the exercise of a constitutional right, here the right not to consent to a warrantless entry.

Id. at 1351; accord, Gasho v. United States, 39 F.3d 1420, 1431-32 (9th Cir. 1994) (citing Prescott and noting refusal to consent to warrantless search cannot be considered evidence of criminal wrongdoing). In addition to the Ninth Circuit in Prescott, four other federal circuit courts of appeal and appellate courts in at least fifteen other states have suggested or concluded

evidence of refusing consent to search is inadmissible, particularly if used as substantive evidence of guilt.<sup>2</sup>

Before trial, Gauthier objected strenuously to this evidence on the grounds that it violated his Fifth and Sixth Amendment rights to counsel and to be free from coerced self-incrimination. CP 15, 16; 1RP 138-44. Although Gauthier did not specifically cite the Fourth Amendment or Article I, Section 7, he did raise those concerns by mentioning Gauthier's right to refuse a search. 1RP 140. Additionally, even if this court concludes counsel's objection was insufficiently specific, Gauthier may raise the issue on appeal because it is manifest constitutional error. RAP 2.5(a)(3). The practical consequence of the constitutional error was to persuade the jury that Gauthier acted like a guilty man by exercising his constitutional rights.

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<sup>2</sup> See, e.g., United States v. Runyan, 290 F.3d 223, 249 (5th Cir. 2002); United States v. Moreno, 233 F.3d 937, 941 (7th Cir. 2000); United States v. Dozal, 173 F.3d 787, 794 (10th Cir. 1999); United States v. Thame, 846 F.2d 200, 206-07 (3d Cir. 1988); Elson v. State, 659 P.2d 1195, 1197-99 (Alaska 1983); State v. Stevens, \_\_\_ P.3d \_\_\_, 2012 WL 10356 at \*5 (Ariz. App. Div. Jan. 3, 2012); People v. Wood, 103 Cal. App. 4th 803, 808-09, 127 Cal. Rptr. 2d 132, 136 (2002); Gomez v. State, 572 So.2d 952, 953 (Fla. App. 1990); Longshore v. State, 399 Md. 486, 537-38, 924 A.2d 1129 (2007); People v. Stephens, 133 Mich. App. 294, 298, 349 N.W.2d 162 (1984); Ramet v. State, 125 Nev. 195, 198, 209 P.3d 268 (2009); Garcia v. State, 103 N.M. 713, 714, 712 P.2d 1375 (1986); State v. Jennings, 333 N.C. 579, 604-05, 430 S.E.2d 188 (1993); State v. Wiles, 59 Ohio St.3d 71, 88, 571 N.E.2d 97 (1991); Commonwealth v. Tillery, 417 Pa. Super. 26, 34, 611 A.2d 1245 (1992); Simmons v. State, 308 S.C. 481, 484-85, 419 S.E.2d 225 (1992); State v. Bowker, 754 N.W.2d 56, 70 (S.D. 2008); Reeves v. State, 969 S.W.2d 471, 493-95 (Tex. Ct. App. 1998); State v. Banks, 328 Wis.2d 766, 782, 790 N.W.2d 526 (2010). But see Smith v. State, 199 P.3d 1052, 1061 (Wyo. 2009) (holding that evidence of refusal to provide DNA sample was not prohibited by Fifth Amendment).

b. The Prosecutor Intentionally Commented on the Right to Refuse a Search for No Other Purpose than to Penalize Gauthier's Exercise of that Right.

Washington courts distinguish between mere references to constitutional rights and intentionally inviting the jury to infer guilt from the exercise of a constitutional right. State v. Burke, 163 Wn.2d 204, 221-22, 181 P.3d 1 (2008). The prosecutor's comments here fall on the wrong side of that line.

In Burke, the prosecutor emphasized in opening statements, and the interviewing officer testified, that Burke's father interjected to end Burke's interview with police until he could speak with an attorney. Id. at 209. The prosecutor described the father as advising his son to end the interview after "sensing that it wasn't necessarily okay to have sex with [J.S.]." Id. at 222. The court found Burke's right to silence was violated because the State "advanced the link between guilt and termination of the interview," thereby implying that "suspects who invoke their right to silence do so because they know they have done something wrong." Id.

As in Burke, the prosecutor's comments in this case were manifestly intended to penalize the exercise of a constitutional right. This was not a mere passing reference. The State focused on Gauthier's refusal to provide a DNA sample in cross-examination when Gauthier testified and in Detective Knudsen's rebuttal testimony. 4RP 173-75; 5RP 51-55. Then, the

prosecutor expressly argued in closing that this refusal showed Gauthier was guilty. 5RP 113. The prosecutor's comment on Gauthier's exercise of his constitutional rights was, if anything, more explicit than that held to be error in Burke.

The evidence and argument violated Gauthier's constitutional rights because the prosecutor used the evidence of Gauthier's refusal of consent to search as substantive evidence of guilt, not mere impeachment. Burke, 163 Wn.2d at 222. When the defendant testifies, pre-arrest silence may be used to impeach, but may not be used as substantive evidence of guilt. Id. The Burke court explained the difference between impeachment and substantive evidence: "Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true." Id. at 219 (citations omitted).

Here, even if Gauthier's refusal to provide a DNA sample were admissible to impeach his credibility (this is debatable since the rules of evidence prohibit impeachment on collateral matters not material to the elements of the charge), the prosecutor's use of it in closing argument clearly crossed the line drawn by Burke. The comment on pre-arrest silence in Burke was impermissible because "The implication is that suspects who invoke their right to silence do so because they know they have done

something wrong.” 163 Wn.2d at 222. Here, the prosecutor argued, “You don’t want to provide your DNA sample because, you know, it’s going to be there. Because you’re guilty.” 5RP 113. Under Burke, this was not fair impeachment, but an impermissible comment on a constitutional right.

Other jurisdictions have admitted evidence of refusal of consent to search if the refusal is relevant to a purpose other than simply penalizing the exercise of a constitutional right, such as to expressly rebut a material claim by the defense. For example, in People v. Chavez, 190 P.3d 760, 766-67 (Colo. App. 2007) and United States v. Dozal, 173 F.3d 787, 794 (10th Cir. 1999), the court held evidence the defendant refused consent to search was admissible as a fair response to the defendant’s testimony he did not have dominion or control over the premises. Similarly, in United States v. McNatt, 931 F.2d 251, 256–58 (4th Cir. 1991), the court held such evidence was admissible to rebut the defendant’s claim the police had planted the illegal drugs in his car. And in Leavitt v. Arave, 383 F.3d 809, 827 (9th Cir. 2004), the court held it was admissible to rebut the defendant’s claim he cooperated fully with police.

But the State did not use Gauthier’s reasonable refusal for a permissible purpose in this case. Once the evidence was admitted over the defense’s objection, the defense tried to minimize the damage by showing Gauthier was not uncooperative; he merely followed his attorney’s advice.

SRP 101. Rather than countering this argument, the State argued in rebuttal that because Gauthier refused to give a DNA sample, which he had a constitutional right to do, he must be guilty. SRP 113. Admission of the refusal evidence, taken together with the prosecutor's comments, violated Gauthier's rights under the Fourth Amendment and Article 1, Section 7 because the only purpose was to penalize him for exercising those rights.

c. This Constitutional Error Was Not Harmless Beyond a Reasonable Doubt.

The State punished Gauthier for exercising his rights under the Fourth Amendment and Article 1, Section 7 of the Washington Constitution. SRP 113. This constitutional error cannot be harmless unless the State proves beyond a reasonable doubt that any reasonable juror would have come to the same conclusion without the error. Burke, 163 Wn.2d at 222; see also Stevens, \_\_\_\_ P.3d at \_\_\_\_, 2012 WL 10356 at \*5 (defendant prejudiced by evidence of assertion of Fourth Amendment rights because denial of consent to search was the only evidence tying defendant to the illegal narcotics found in her son's room). It cannot do so in this case.

As in Burke, the comment on Gauthier's constitutional rights was likely to tip the scale in a case that depended largely upon credibility. See 163 Wn.2d at 222-23. Burke was also a rape case where identity was not an issue and guilt hinged on the circumstances of the interaction. The Burke

court reasoned that the entire trial, “boiled down to whether the jury believed or disbelieved Burke’s story . . . . Repeated references to Burke’s silence had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt.” Id. at 222-23.

Here, there were also “repeated references” to Gauthier’s refusal of the DNA sample. 4RP 173-75; 5RP 51-55; Burke, 163 Wn.2d at 222-23. The prosecutor asked numerous questions relating to the detective’s efforts to secure a DNA sample from Gauthier, first on cross examination of Gauthier and then on rebuttal testimony from Knudsen. 4RP 173-75; 5RP 51-55. The refusal evidence went hand in hand with the State’s rebuttal argument that only a guilty person would refuse to give a DNA sample. 5RP 113.

A rational juror could have doubted T.A.’s account because her story was dubious in numerous ways: She claimed to be afraid, yet immediately after the alleged rape went back out on the streets alone at night with a kitchen knife to hunt down her alleged attacker. 4RP 46. She claimed to be too distraught to tell her sister the details of what happened; yet she told her 10-year-old daughter. 4RP 52. Her statements about the timing of the evening’s events were inconsistent. 4RP 21-22, 84-85, 88. Rational doubts arising from these inconsistencies may have been swept away by the State’s improper comment on Gauthier’s exercise of constitutional rights.

This case boiled down to credibility, and the testimony on Gauthier's refusal to give a DNA sample presented the jury with improper substantive evidence of guilt. See Burke, 163 Wn.2d at 222-23. In rebuttal argument, the prosecutor explicitly equated Gauthier's exercise of his constitutional rights with the actions of a guilty man. 5RP 113. The evidence and argument violated Gauthier's right to a fair trial by unconstitutionally commenting on his constitutional rights. See Prescott, 581 F.2d at 1350-51; Burke, 163 Wn.2d at 222-23; cf. Jones, 168 Wn.2d at 725. The State cannot show the error was harmless beyond a reasonable doubt.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO ASSERT GAUTHIER'S PRIVACY RIGHTS OR OBJECT TO CLOSING ARGUMENT THAT BURDENED THOSE RIGHTS.

If this Court concludes the constitutional error was not preserved because counsel did not raise an argument under the Fourth Amendment or Article 1, Section 7 or object to the prosecutor's comments during closing argument, those failings deprived Gauthier of his constitutional right to effective assistance of counsel. "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and

Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Appellate courts review ineffective assistance of counsel claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003) (citing State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000)).

Counsel's performance in failing to clearly raise a Fourth Amendment argument was unreasonably deficient performance in light of the copious case law holding that evidence of denying consent to search violates the Fourth Amendment. See argument section C.1., supra. Counsel clearly understood this evidence was damaging and intended to try to keep it from the jury. 1RP 138-44. It was unreasonably deficient to fail to cite the law that would have supported that argument. See, e.g., State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel deficient for failing to recognize and cite appropriate case law, to sentencing court to argue for consideration of special sex offender sentencing alternative).

In light of the court's stern admonition in Jones more than a year before this case, it was also unreasonably deficient performance not to object

when the prosecutor argued Gauthier must be guilty because he exercised his constitutional rights. 168 Wn.2d at 725. Counsel was ineffective in failing to preserve this error for appellate review. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice from deficient attorney performance requires reversal whenever the error undermines confidence in the outcome. Id. That confidence is undermined here. Because, as discussed above, the case hinged entirely on credibility, there is a reasonable probability that improper evidence and argument regarding Gauthier's refusal to give his DNA was a deciding factor. Gauthier's conviction should be reversed because he was denied his constitutional right to effective assistance of counsel. See Simmons, 308 S.C. at 484-85 (failure to object to cross-examination and argument concerning refusal to allow warrantless search was unreasonable and prejudiced defendant).

3. ALTERNATIVELY, THE PROSECUTOR'S COMMENTS PENALIZING GAUTHIER'S EXERCISE OF HIS RIGHT TO REFUSE CONSENT TO SEARCH WERE FLAGRANT AND ILL-INTENTIONED MISCONDUCT THAT REQUIRES REVERSAL.

Prosecutors are quasi-judicial officers with an independent duty to act in the interests of justice and ensure that accused persons receive a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. State v. Belgrade, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). The trial is not fair when the prosecutor commits misconduct and that misconduct is likely to affect the jury. Fisher, 165 Wn.2d at 747. Even when there is no objection at the time, misconduct requires reversal when it is so flagrant and ill-intentioned that the resulting prejudice could not have been cured by instructing the jury. Id.

Here, the prosecutor committed flagrant and ill-intentioned misconduct by encouraging the jury to find Gauthier guilty because he exercised his constitutional right to refuse consent to a warrantless search. In State v. Fleming, the court held the argument that in order to acquit, the jury must find the State's witness was lying was flagrant and ill-intentioned because it was made over two years after the argument had been declared improper. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). Here, the prosecutor's comments were improper under

Jones, decided more than a year before the trial in this case. 168 Wn.2d at 725. This was not the type of argument the jury would have been able to simply ignore if instructed to do so. “[W]here the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors,” an instruction to disregard is futile. State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). To put it bluntly, “[I]f you throw a skunk into the jury box, you can’t instruct the jury not to smell it.” Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962). Even if this court should find no constitutional violation, Gauthier’s conviction should be reversed because prosecutorial misconduct rendered his trial unfair.

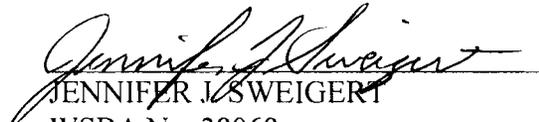
D. CONCLUSION

Using Gauthier's assertion of his constitutional right to refuse a warrantless search as evidence of his guilt denied him a fair trial. Alternatively, counsel was ineffective in failing to cite the law supporting exclusion of this evidence and failing to object to the improper argument. Additionally, the prosecutor's argument was flagrant misconduct that denied Gauthier a fair trial. For the foregoing reasons, Gauthier requests this Court reverse his conviction.

DATED this 3rd day of February, 2012.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 67377-7-1
	)	
THOMAS GAUTHIER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3<sup>RD</sup> DAY OF FEBRUARY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS GAUTHIER  
DOC NO. 757736  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2012.

x Patrick Mayovsky

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STATE OF WASHINGTON  
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